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IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

In Error from the Supreme Court of the State of Washington.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEANE, F. S. BELL, IVAN CHASE, JOHN K. MCCORNACK, ANN J. CLYDE, J. R. MALHERN, SPOKANE & PALOUSE RAILWAY COMPANY (a Corporation), SPOKANE & PALOUSE LAND COMPANY (a Corporation), PALOUSE MILL COMPANY (a Corporation), and A. F. PUGH,

Plaintiffs in Error,

vs.

JACOB SLAGHT,

Defendant in Error.

Brief of Defendant in Error.

U. L. ETTINGER,
CHARLES M. WYMAN,
AND THOMAS NEILL,

Attorneys for Defendant in Error, Colfax, Washington.

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Attorneys for Appellee.
Colfax, Washington.

STATEMENT OF CASE.

The title of the plaintiff in error is deraigned from the N. P. R. R. Co. The title of the N. P. R. R. Co. is based upon the provisions of its grant from the government by act of congress dated July 2, 1864. Section 3 of that act is as follows:

"Sec. 3. And be it further enacted, That there be, and hereby is, granted to the Northern Pacific Railroad Company its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-

emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, further, That all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd

numbered sections, nearest to the line of said road may be selected as above provided: And provided, further, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided, further, That no money shall be drawn from the Treasury of the United States to aid in the construction of said 'Northern Pacific Railroad.'"

Section 6 is as follows:

"Sec. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; (b) and the add sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided by this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights and the acts amendatory thereof, and of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alter-

native sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale (c)".

The facts are almost identically those involved in N. P. R. R. Co., vs. Miller, a land office decision reported in 7 L. D. page 105, from which case the following statement of the action taken by the railroad company under the terms of its charter and of the department in pursuance thereof, is taken, it being unpracticable for the defendant in error, to refer to the original records of the department.

On March 6, 1865, the President of the Company filed with the Secretary of the Interior, a map, indicating the general route of the road, and at the same time asked that a withdrawal of the lands granted to the company as designated by the map be withdrawn from settlement and sale.

This is commonly known as the Perham map of general route.

On March 9, 1865, the Secretary of the Interior transmitted this map to the Commissioner of the Land Department, stating that he thought that the odd numbered sections as shown by the Perham map ought to withdraw to a distance of ten miles on each side of the road in the states (Minnesota and Wisconsin) and twenty miles on each side

of the road in the territories through which the line of road passed, unless the Commissioner should perceive some objection thereto.

Objections were thereafter made by the Commissioner and no action was taken by the department in pursuance of the request for and suggestion by the Secretary of a withdrawal of the lands described in the Perham map.

N. P. R. R. Co. vs. Miller, 7 L. D. 103-4.

On July 30, 1870, two maps of general route were filed by the Northern Pacific Railroad Company in the department, the first covering that portion of the proposed line from Lake Superior to a point on the right bank of the Columbia river, opposite the mouth of the Walla Walla river in the then Territory of Washington, and the second from the point last above located westward to the Coast.

On August 13, 1870, the Secretary transmitted the maps to the Commissioner as showing the designated route of the Northern Pacific Railroad Company, and then and within a few days thereafter, directed a withdrawal of all the lands embraced within its limits within the Territory of Washington as designated by said maps.

N. P. R. R. Co. vs. Miller, 7 L. D. pages 104-5.

The lands in controversy were not within either the place or indemnity limits of this withdrawal. "The line of

general route so established, entered the Territory (of Washington) near the southeast corner thereof at a point about ten miles north of the Oregon line, and thence nearly due west to the junction of the Walla Walla and Columbia rivers." (N. P. R. R. Co. vs. Miller, 7 L. D. 105.)

On February 21, 1872, the company filed another and what is now styled an "Amended map" of general route of the road, and a withdrawal was ordered by the Secretary of the lands within its place limits.

"The new line * * * entered the Territory at a point about 108 miles north of the point at which the line designated by the map of 1870, crossed the eastern boundary, and thence ran in a southwesterly direction to the mouth of the Walla Walla river, where it joined the line of 1870. (N. P. R. R. Co. vs. Miller, 7 L. D. 106.)

This map of general route and order of withdrawal (of 1872) included within its place limits the lands in controversy.

On October 4, 1880, the company filed its map of definite location, and thereupon the Secretary withdrew the lands within its place and *indemnity* limits. The lands in controversy were without the place but within the indemnity limits of the road as thus definitely located. This order of withdrawal, so far as it affected lands within the indem-

nity limits of the map if definite location was revoked by the secretary of the interior on August 15, 1887. (Vol. 6. L. D. 92-3.)

On December 15, 1883, the N. P. R. R. Co., selected the lands in controversy as indemnity in lieu lands lost within its place limits. This was a bulk selection and was not approved by the Secretary of the Interior, for reasons set forth in N. P. R. R. Co., vs. Miller, 7. L. D. 123-124.

On October 25, 1887, it again selected these lands as indemnity losses alleged to have been suffered in its place limits. This selection was not approved by the Secretary for reasons stated in N. P. R. R. Co., vs. Miller 7 L. D. 124.

Prior to either of these selections and on March 1st, 1883, the respondent settled upon the lands with the bona fide intention of filing thereon as a homestead, and on October 31, 1887, presented his application to file thereon. Findings Commissioner Transcript p. 8. On August 4th, 1887, the N. P. R. R. Co., conveyed to Powers the land in controversy. Transcript p. 9.

Upon due notice of the application of the respondent to enter the lands, the N. P. R. R. Co., appeared in the district

land office in which said application was pending and made its written objections to the allowance of the entry and thereafter Powers intervened and asserted his rights. Transcript p. 8.

It nowhere appears what the showing by either of the parties was before the district office: except in the opinion of the Commissioner, and his opinion does not purport to contain more than a resume of what he deemed the salient points. The local land office decided adversely to the N. P. R. R. Co., and adversely to the defendant in error, Jacob Slaght herein, and in favor of Powers, who then by virtue of the conveyance above alluded to, possessed all the title which the company had. The N. P. R. R. Co., and the defendant in error, Jacob Slaght, appealed to the Commissioner of the general land office who reversed the holding of the district land office, and decided in favor of the defendant in error, Jacob Slaght, and against the N. P. R. R. Co., and Powers. Transcript p. 8-9-10.

The N. P. R. R. Co., which had parted with its title, if any, to the lands, did, and Powers, its successor in interest, did not appeal to the Secretary of the Interior. Transcript p. 10-11. The Secretary sustained the holding of the Commissioner, but on what findings of fact or conclusions of

law, does not appear. Transcript p. 10. Subsequently in 1892 and 1893, the N. P. R. R. Co., selected these lands in lieu of lands lost in Yakima Reservation. (Transcript p. 6.) These lands were not surveyed at the time of the former selections, nor was the line of road through the Yakima Indian Reservation then definitely located and of course until definite location, no claim for indemnity could be sustained. N. P. R. R. Co., vs. Miller, 7 L. D. 124-5. A patent to the lands upon final proof was issued to respondent in 1897. (Transcript p. 10-11.) Prior to the commencement of this action Powers conveyed portions of the land to his co defendants. (Transcript p. 11.)

It is also pleaded that the lands in the indemnity limits were insufficient to satisfy losses in the place limits of the road. (Transcript p. 4-5.) It is not pleaded, however, that such fact has been entertained or found by the Secretary, or that any of the selections were approved by him. Some of the facts hereinbefore stated do not appear in the complaint, but do appear in the cases cited by the Commissioner in his judgment as set forth in the complaint and cases there cited. Inasmuch as they clearly form the basis of his opinion, it will be contended that they (the facts upon which the Commissioners' decision was based)

should have been pleaded, and that this court must either adopt them by such reference or sustain the demurrer as a matter of practice.

Subsequently, the plaintiff in error filed its complaint in the Superior Court of Whitman County, Washington, which complaint was thereafter twice amended, and finally a judgment in favor of the defendant in error here, was entered in that court upon a demurrer to the second amended complaint. From this judgment an appeal was taken to the Supreme Court of the State of Washington, where the judgment of the lower court was affirmed.

The case of Powers vs. Slaght (20 Washington, 712) was argued with and at the same time as was Moore vs. Cormode (20 Washington, 503), with which the facts are identical, except in respect to point One hereinafter submitted, which we believe was not involved in that case.

POINTS AND AUTHORITIES.

I.

THE PLAINTIFFS IN ERROR ARE ESTOPPED BY REASON OF POWER'S FAILURE TO APPEAL FROM COMMISSIONER'S DECISION.

High on Jnjunctions, Vol. I, 173.
Manning v Hunt, 36 Tex. 118.
Savoise v Theodaux, 29 La, Ann. 51.
Palmer v Gardner, 77 Ill. 143.
Schwab v City of Madison, 49 Ind. 329.
Naughton v Drinkgrave, 25 La. Ann. 538.
Crim v Handley, 94 U. S. 652.
Hendrickson v Hinckley, 17 How. 443.
Ard. v Brandon, 156 U. S. 537.

II.

THE SUIT OF THE PLAINTIFFS IN ERROR WAS BARRED BY THE STATUTE OF LIMITATIONS.

N. P. R. Co. v Colburn, 164 U. S. 385.
St. Paul & Pac. R. Co. v N. P. R. Co. 138 U. S. 1.
Deseret Salt Co. v Tarpey, 142 U. S. 241.
2 Ballinger's Code (Wash.) Secs. 4797-4907.

III.

THE COMPLAINT IS INSUFFICIENT UNDER THE RULE OF LOCAL PRACTICE.

19 L. D. 87.
17 L. D. 8.
Moore v Cormode, 20 Wash. 305,
Durango Land Co. v Evans, 80 Fed. 425.
Johnson v Drew, 171 U. S. 93.
Lee v Johnson, 116 U. S. 48.
Quimby v Conlan, 104 U. S. 420.
Marquez v Frisbie, 101 U. S. 473.
Vance v Burbank, 101 U. S. 514.
Moore v Robbins, 96 U. S. 530.
Shepley v Cowan, 91 U. S. 330.
Johnson v Towsley, 13 Wal. 72.
Sanford v Sanford, 139 U. S. 642.
Barden v N. P. R. Co. 154 U. S. 288.
Wis. R. Co. v Price Co. 133 U. S. 496-511.
Wis. R. Co. v Forsythe, 159 U. S. 558.
U. S. v. M. K. & T. R. Co. 141 U. S. 358.
U. S. v Colton Co. 146 U. S. 615.
Elling v Trexton, 7 Mon. 330.
Grandin v LaBar, 57 N. W. 243.
Reser v Carney, 54 N. W. 89.
N. P. R. Co. v Miller, 7 L. D. 100.
Grunewald v N. P. R. Co. 24 L. D. 195.
In re N. P. R. Co. 25 L. D. 511.
Jackson v Lamour Co. 46 N. W. 449.

IV.

THE LANDS EMBRACED WITHIN THE TERMS OF SECTION 6 OF THE GRANT ARE WITHDRAWN PER FORCE OF THE STATUTE. THE LANDS IN CONTROVERSY WERE NOT WITHIN THE FORTY MILE STRIP AND WERE NOT THEREFORE WITHDRAWN BY THE TERMS OF THE STATUTE.

U. S. v Or. & Cal. R. Co. 20 Sup. Ct. Rep. 26.
U. S. v M. K. & T. R. Co. 141 U. S. 358.
K. P. R. Co. v Atchinson R. Co. 112 U. S. 414.
Wis. R. Co. v Price Co. 113 U. S. 496.
Buttz v N. P. R. Co. 119 U. S. 55.
St. Paul & Pac. R. Co. v N. P. R. Co. 139 U. S. 1.
U. S. v S. P. R. Co. 146 U. S. 570.
N. P. R. Co. v Musser Sauntry Co. 168 U. S. 604.
Burfenning v Chicago R. Co. 163 U. S. 321.
N. P. R. Co. v Miller, 7 L. D. 104-5-6.
U. S. v Or. & Cal. R. Co. 20 Sup. Ct. Rep. 269.
U. S. v Moore, 95 U. S. 760.
In re Al. & Pac. R. Co. 6 L. D. 77 et seq.
N. P. R. Co. v Cole, 17 L. D. 8.
In re Fla. & Pen. R. Co. 15 L. D. 529.
M. K. &. T. Co. v Trexler, 17 L. D. 122.
N. P. R. Co. v Lillethun, 21 L. D. 487.
N. P. R. Co. v Davis, 19 L. D. 87.
S. P. R. Co. v Kanawyer, 23 L. D. 500.
Grunewald v N. P. R. Co. 24 L. D. 195.
N. P. R. Co. v St. P. & M. M. Co. 25 L. D. 67.
N. P. R. Co. v Streib, 26 L. D. 589.
Stuart v S. P. R. Co. 22 L. D. 61.
Elling v Thexton, (Mont. 330) 16 Pac. 931.
Grandin v LaBar, (N. Dak.) 57 N. W. 243.
Moore v Cormode, 20 Wash. 305,
Van Wyck v Klevano, 106 U. S. 366.

V.

THE ORDER OF THE DEPARTMENT DIRECTING THE WITHDRAWAL OF LANDS BEYOND THE FORTY MILE STRIP CONVEYED NO INTEREST IN THE LANDS TO THE COMPANY AND WAS REVOCABLE.

6 L. D. 77 to 93.
Woods v Beach, 156 U. S. 548.
Riley v Welles, 76 U. S. 246.
Wolcott v Des Moines R. Co. 72 U. S. 681.
Burfenning v R. Co. 163 U. S. 321.
Woolsey v Chapman, 101 U. S. 755.
2 L. D. 516.
In re S. P. R. Co. 18 L. D. 315.
S. P. R. Co. v McWharter, 14 L. D. 612.
S. P. R. Co. v Meyer, 9 L. D. 250.
N. P. R. Co. v Miller, 7 L. D. 100.
U. S. v Moore, 95 U. S. 760.
N. P. R. Co v Miller, 7 L. D. 124-5.
Knight v United Land Asso 142 U. S. 161.
Bishop of Nesqually v Gibbon, 158 U. S. 155.

VI.

THE ALLEGED SELECTIONS, PRECEEDING THE ENTRY WERE NOT APPROVED BY THE SECRETARY OF THE INTERIOR AND WERE INSUFFICIENT TO DEFEAT THE ENTRY OF THE DEFENDANT IN ERROR.

Lee v Johnson, 116 U. S. 48.
Johnson v Towsley, 13 Wal. 72.
Shepley v Cowan, 91 U. S. 330.
Moore v Robbins, 96 U. S. 530.

Marquez v Frisbie, 101 U. S. 473.
Vance v Burbank, 101 U. S. 514.
Sanford v Sanford, 139 U. S. 642.
N. P. R. Co. v Colburn, 164 U. S. 383.
Miller v N. P. R. Co. 7 L. D. 123-4-5.
In re N. P. R. Co. 25 L. D. 512.
N. P. R. Co. v Sanders, 166 U. S. 620.
N. P. R. Co. v Logging Co. 168 U. S. 605.
N. P. R. Co. v DeLacey, 174 U. S. 622.
In re At. & Pac. 8 L. D. 373.
N. P. R. Co. v John O. Miller, 11 L. D. 1-428.
In re S. M. R. Ex. Co. 12 L. D. 518.
In re F. C. & P. R. Co. 15 L. D. 529.
Wood v Burlington R. Co. 104 U. S. 329.
Wiley v N. P. R. Co. 22 L. D. 606.
LaBar v N. P. R. Co. 17 L. D. 406.
N. P. R. Co. v Lynch, 22 L. D. 609.
S. P. R. Co. v McKinley, 22 L. D. 493.
State of Wash. v N. P. R. Co. 22 L. D. 482.
N. P. R. Co. v Holtz, 22 L. D. 309.
U. S. v M. K. R. Co. 141 U. S. 358.
St. P. R. Co. v Winona R. Co. 112 U. S. 720.
Sioux City R. Co. v Chicago R. Co. 117 U. S. 405.
Cedar Rapids R. Co. v Herring, 110 U. S. 27.
M. K. &. T. Co. v K. P. & R. Co. 97 U. S. 491.
Wis. R. Co. v Price Co. 133 U. S. 496.
Wis. R. Co. v Forsythe, 159 U. S. 46.
U. S. v Colton Co. 146 U. S. 615.
Ryan v R. R. Co. 99 U. S. 382.
Grunewald v N. P. R. Co. 24 L. D. 195.

ARGUMENT.

I.

THE PLAINTIFFS IN ERROR ARE ESTOPPED BY REASON OF POWER'S FAILURE TO APPEAL FROM THE COMMISSIONER'S DECISION.

It appears from the case, as made and set forth in the pleadings, that at the time of the hearing in the District land office in the matter then pending between the defendant in error and the Northern Pacific Railroad Company, that the plaintiff in error, William L. Powers, who is the grantor of this plaintiff herein, was vested with all the title and interest which he now has in the lands involved in this suit. That he intervened in that matter and set up his rights there. That the case was decided against him by the Commissioner and that he did not appeal.

For such errors as were committed by the Commissioner he had provided for him, an adequate remedy, according to the rules and regulations of the department, and the law, by appeal to the Secretary of the Interior.

It is a rule of almost universal adoption, that where an error has been committed by an inferior court, or tribunal and the party injured has an adequate remedy by appeal, that in the absence of fraud or mistake, neither of which are pleaded in this case, equity will not afford him relief, who has neglected or refused to seek it in the forum, constituted expressly for the purpose of correcting such error.

High on Injunctions, Vol. 1, 173.
Manning v Hunt, 36 Tex. 118.
Savoise v Theodaux, 29 La. Ann. 51.
Palmer v Gardner, 77 Ill. 143.
Schwab v City of Madison, 49 Ind. 329.
Naughton v Drinkgrave, 25 La. Ann. 538.
Crim v Handley, 94 U. S. 652.
Hendrickson v Hinckley, 17 How. 443.

In this case the Northern Pacific Railroad Company which had no interest to protect (for there is no evidence or allegation that its deed to Powers was other than a quit claim) appealed from the Commissioner's decision but does not sue, but Powers who held the entire title, did not appeal but does sue. To permit him to have relief here, which he might have obtained by appeal to the Secretary would be contrary to the rule.

The case of Ard vs. Brandon, 156 U. S. 537, is not to the contrary, but clearly recognizes the application of the

rule to proceedings in the land office. The failure to appeal there, being due to a mistake caused by the reliance of the party upon misleading information furnished him by the department, an exception was made because of equities. No reason or excuse is pleaded or shown in this case to forbid the application of the rule.

II.

THE SUIT OF THE PLAINTIFF IN ERROR WAS BARRED BY THE STATUTE OF LIMITATIONS.

It has been held by this court that the grant to the N. P. R. Co., operated to pass the fee to the lands in the grant to the company, upon the date of the filing of the map of definite location in the place limits and upon selection in the indemnity limits.

> N. P. R. C. v Colburn, 164 U. S. 385.
> St. P. & Pac. R. Co. v N. P. R. Co. 138 U. S. 1.
> Deseret Salt Co. v Tarpey, 142 U. S. 241.

Actions for the recovery of real estate are barred in this state after ten years.

> 2 Ballinger's Code (Wash.) Sec. 4797.

The statute was properly pleaded by demurrer in this case.

Transcript, p. 14.
2 Ballinger's Code, Sec. 4907.

The possession, continuous and adverse of the defendant in error, is not disputed, from the date of his filing in 1887.

If as contended by the plaintiff in error, title, the fee, passed to the company, to the lands, by the selection of December 17, 1883, or of October, 1887, independent of a patent, as held in the N. P. Co. vs. Colburn, supra, then suit was instituted too late, the statute barred recovery and the demurrer was properly sustained.

III.

THE COMPLAINT IS INSUFFICIENT UNDER THE RULE OF LOCAL PRACTICE.

The decision of the commissioner was based upon facts which appeared, probably in the findings of the District Land Office, and presumably in the testimony, but which were not stated in his opinion as pleaded, nor in the allegations of the complaint.

This appears from his opinion set forth in the complaint, wherein without findings of the fact to base it upon, the commissioner says: "These withdrawals have been

held by the department to be without authority of law and no effect;" (17 L. D. 8 and 19 L. D. 87)," thereby adopting the facts appearing in cases cited.

An examination of the land decisions cited by the commissioner will show that the facts upon which he based his opinion that the withdrawals referred to were invalid, are not pleaded.

Under such circumstances, because it affirmatively appears in the complaint that the facts upon which the alleged error is based, are not pleaded, it has been very generally held that the complaint is insufficient upon the ground amongst others of the presumption in favor of the judgment sought to be reviewed, and the patent sought to be annuled.

Moore v Cormode, 20 Wash. 305.
Durango Land Co. v Evans, 80 Fed. 425.
Johnson v Drew, 171 U. S. 93.
Lee v Johnson, 116 U. S. 48.
Quimby v Conlan, 104 U. S. 420.
Marquez v Frisbie, 101 U. S. 473.
Vance v Burbank, 101 U. S. 514.
Moore v Robbins, 96 U. S. 530.
Shepley v Cowan, 91 U. S. 330.
Johnson v Towsley, 13 Wal. 72.
Sanford v Sanford, 139 U. S. 642.

The plaintiffs in error's title depends upon the selection of the lands in controversy in lieu of lands lost by the N.

P. R. R. Company in the main limits of its grant. The allegations in reference to the alleged selections, appear in par. VIII, transcript p. 5-6, and are clearly insufficient, in that it does not appear that the attempted selections were approved by the Secretary of the Interior. The allegations are almost identical in form and substance with those held to be insufficient by his court in Barden vs. N. P. R. R. Co. 154U. S. 288. "Nor can such approval be inferred from his not formally rejecting them." "The approval of the Secretary was essential to the efficacy of the selections and to give the company any title to the lands selected. His action in the matter was not ministerial but judicial. He was required to determine in the first place whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands."

Wis. R. Co. v Price Co. 133 U. S. 496-511.
Wis. R. Co. v Forsythe, 159 U. S. 46.
U. S. v M. K. & T. R. Co. 141 U. S. 358.
U. S. v Colton Co. 146 U. S. 615.
Elling v Trexton, 7 Mon. 330.
Grandin v LaBar, 57 N. W. 243.
Moore v Cormode, 20 Wash 305.

If "the approval of the Secretary was essential to the efficacy of the selections" the failure to plead such approval rendered the complaint subject to demurrer, and the holding of the trial court sustaining the demurrer was clearly

correct as a matter of practice whether the selections were approved as a matter of fact or not.

If facts existed which would in equity except this case from the rule requiring an allegation of the approval of such selections by the Secretary, then upon elementary principles, such facts should have been pleaded. They are not pleaded, but on the contrary one would infer from the allegations of the complaint that the pleader supposed the approval of the local officers (the register and receiver) to be sufficient.

As a matter of fact, the Secretary rejected both of the alleged selections of date prior to the defendant in error's entry, amongst other reasons, because the tract in lieu of which the selections were made constituted a part of the Yakima reservation across which the line of the road had not until long after either selection, been definately located, so that it might be that, upon definite location of such portion of the road, there would be no losses.

N. P. R. Co. v Davis, 19 L. D. 87.
N. P. R. Co. v Cole, 17 L. D. 8.
N. P. R. Co. v Miller, 7 L. D. 100.
Grunewald v N. P. R. Co. 24 L. D. 195.
In re N. P R. Co. 25 L D. 511

It would seem clear from the frequent decisions of this court that no right to indemnity could exist prior to de-

finite location of that portion of the road in lieu of lands lost in which, indemnity is sought. If this be true, then the action of the department in refusing to allow the selections was correct. The consideration of this point is however not necessary to the proper determination of the point involved. The State Court held the complaint insufficient because it did not conform to local rules of practice in that it was not pleaded that the selections were approved nor were facts sufficient pleaded, to except the case from the rule requiring such allegation.

Cormode v Moore, 20 Wash. 305.

In these matters governing the course of local practice and pleading, it is submitted that error does not lie on this court, and that the judgment of the court must be affirmed.

IV.

THE LANDS EMBRACED WITHIN THE TERMS OF SECTION 6 OF THE GRANT ARE WITHDRAWN PER FORCE OF THE STATUTE. THE LANDS IN CONTROVERSY WERE NOT WITHIN THE FORTY MILE STRIP AND WERE NOT THEREFORE WITHDRAWN BY THE TERMS OF THE STATUTE.

Irrespective of the question of a statutory or departmental withdrawal, the lands lying within the indemnity

limits of the grant are clearly open to disposition by the government, either to other corporations through legislative grants, to individuals under the homestead or pre-emption laws, or by the creation of reservations to forward some policy of the executive department, until their selection by the grantee under the direction of the secretary of the interior. It has been definitely decided in a number of cases, and so recently as the case of the United States vs. Oregon & California Company, 20 Sup. Ct. Rep. 26, that neither the withdrawal contemplated by the terms of the statute nor those ordered by the department precluded a grant by Congress to another corporation of lands lying within the primary limits of the Northern Pacific grant, prior to definite location of the road.

Within the indemnity limits, it has been settled by this court in numerous decisions, that between adverse claimants, priority of right or interest therein, depends upon priority of selection or (since the act of 1880) priority of settlement, and not priority of grant, or definite location. Where withdrawals from settlement are not involved, it has been decided as to indemnity lands that, "title to them does not vest in the railroad company for the benefit of which they are contingently granted but in the fullest legal sense remains in the United States until they are actually

selected and set apart under the direction of the Secretary of the Interior, especially for indemnity purposes." That such contingent grant is but "a promise to give the company idemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title and until it was executed created *no legal interest*, which could be enforced in the courts."

U. S. v M. K. & T. Co. 141 U. S. 358.
K. P. R. Co. v Atchinson R. Co. 112 U. S. 414.
Wis. R. Co. v Price Co. 113 U. S 496.

Other and perhaps more pertinent expressions in regard to the subject might be cited, but it will be submitted that it was clearly the legislative intent that indemnity lands should be open to the usual modes of disposition under the former statutes in relation to homestead or preemption, and to future special grants in the indemnity limits, subject, however, to such limitation as congress may have imposed in the grant through the statutory withdrawals therein contemplated, if it be true as held by this court, as above quoted, that such grant "created no legal interest to lands in the indemnity limits prior to selection." If the railroad company had no "legal interest" which could be enforced in the court prior to selection in the indemnity limits, then of any disposition which the government might make of such lands, whether under its existing

homestead laws or through future conflicting grants, the railroad company could not complain, because it had been deprived of no legal or equitable interest in the lands, and therefore could have no standing as a party in a court of equity as a complaintant.

It is true that a departmental withdrawal of such lands would amount to the same thing in effect (unless forbidden by Congress and therefore void) because it would prevent the claim of a settler from attaching to the lands pending selection, and thus enable the railroad company's title to attach before that of the settler. But such a withdrawal would create no interest to the lands in favor of the company, and would therefore remain effective only so long as the government saw fit to maintain the status.

The right of the railroad as against the settler to an interest in lands in the indemnity limits of the road prior to selection, must therefor depend, if it have any existence at all, upon a congressional withdrawal of the lands, and the first question for solution is, whether the grant itself provided for a withdrawal of lands within the limits of the grant, and second, the extent of such statutory withdrawal.

This court in numerous instances and notably in Buttz vs. N. P. R. Co., 119 U. S. 55 and in St. Paul and Pac.

vs. N. P. R. Co., 139 U. S. 1, has held that the grant itself expressed the legislative will in relation to the lands covered by the grant and provided for a statutory withdrawal of certain portions of the grant. It has in the cases above referred to and in numerous other decisions, held the orders of the department withdrawing lands within the limits of the grant from settlement, to be mere notices to the public of the terms of the grant. "A wise precaution by the department to give such information to local land officers as may serve to guide aright those seeking settlements on the public lands which the act does not require." Buttz vs. N. P. R. R. Co., supra.

The grant in question, was not a grant of any specific quantity of land; in other words the United States did not agree to convey any certain number of sections of land but only such portions as were undisposed of at definite location, with the privilege of indemnity out of such lands as were subject thereto in the indemnity limits at the date of selection.

U. S. v S. P. R. Co. 146 U. S. 570.
Wis. R. Co. v Price Co. 133 U. S. 496

The value of the grant, to-wit, the number of sections which would ultimately attach, depended upon how diligently the work on the road should be prosecuted.

N. P. R. Co. v Musser Sauntry Co. 168 U. S. 605.

Congress having thus expressed its policy that the value of the grant should depend upon the diligence of the grantee, also provided as heretofore suggested, that a certain quantity of lands should be withdrawn for the benefit of the road upon filing its map of general route. In that congress made no provisions for any other withdrawal or for the revocation of such general route withdrawal when made, it would seem to follow both from the terms of the grant and its construction by the courts, that no other withdrawal than a general route withdrawal was contemplated, and that when such withdrawal became effective the lands within the limits of such withdrawal, should remain so withdrawn from settlement, until patents should be issued to the company for such lands as they were entitled to under the terms of the grant. We believe that by no reasonable construction of the grant, can any authority be found for more than one withdrawal, or for a withdrawal of lands other than those contemplated upon the establishment of the general route of the road, or for any authority in the department to change, alter or enlarge the territory covered, or extent of the withdrawal, when the lands covered by the grant become once identified so as to come within its terms, by the filing of a map of general route approved by the Secretary.

Van Wyck v Klevano, 106 U. S. 366.

The grant was not a gift or a concession, but in the nature of a contract, in which each party sought to express in its terms all of the demands of the other to which it was willing to agree, and we suppose that the general rules relating to the construction of an ordinary contract would apply, in the general respects at least in which such rules will be revoked by the defendant in error.

The courts would neither take from the grantee any rights or privileges granted nor would it add any. Had the grant been one of a specific number of sections, the courts would not attempt to overrule the will of congress and violate the terms of the contract by depriving it of any portion of the lands conveyed, nor should they, we submit, give the company any benefit or privileges for which the parties did not at the date of the contract stipulate; it should not therefore give the company the benefit of two withdrawals where congress and the company had agreed upon one, any more than it would say that it should not have the one stipulated. If for any reason which congress should deem equitable, the grantee should have established its general route and the lands within its limits should thus become attached to the grant, and the company should desire to establish another general route and possess other lands in lieu of those covered by its grant, as thus defined, con-

gress could and we submit congress alone could, grant the desired relief. In other words, when the general route of the road became once established, the lands within its boundaries became the lands, and the only lands of the grant. The world might then adjust itself to the condition, and no power, except that of congress, could give to the grantee other lands because that would amount to a new grant.

The same principles would apply to the action of the executive department. Congress having expressed the terms upon which it was willing to convey the lands covered by the grant, and having expressly provided for such intermediate action for the benefit of the railroad as it was willing to agree to (and we believe all the grantee then asked) those benefits so far as the department had to do with them, should have been extended just as far as Congress provided; a step either way, either in extending or limiting these privileges amounting to the insertion within the terms of the grant of a new agreement ought to be held to be held void as without authority, upon elementary principles.

Burfenning v Chicago R. Co. 163 U. S. 321.

If we are not mistaken in supposing that the grant provides for a statutory withdrawal of such lands as the

parties agreed and Congress contemplated should be withdrawn for the benefit of the grantee, and that such withdrawal extended from the date of the general route withdrawal until definite location in the primary and until selection in the indemnity limits, and that the department had no authority to alter, limit or extend the contract as thus made, or the will of Congress as thus expressed, then the judgment of the Court below was clearly correct, for two reasons: first, because it appears that prior to Feb. 21, 1872, the date of the general route pleaded Transcript P. 2 the general route of the Northern Pacific R. R. Co. was established in the territory of Washington on July 30, 1870, and an order of withdrawal directed in pursuance thereof on August 13, 1870, by the Commissioner with the approval of the Secretary of the Interior.

N. P. R Co v Miller, 7 L D. 104-5-6.

The history of this general route withdrawal is fully set forth in the case last above cited, and unless the facts there stated establish the statutory general route, then none ever was established. Every requirement of the act and of the Department was complied with. The lands in controversy did not fall within the limits of this order of withdrawal nor within either the primary or indemnity limits of the general route of the road as thus located.

We do not propose to now discuss this point under this general topic, further than to say, that this court has in several instances, and as late as in the recent case of U. S. vs, Or. & Cal. R. Co. 20 sup Ct. Rep. 269, held, that the map of 1870 and the approval of the department thereon, constituted the general route of the road. If the general route of the road as thus located, constituted the general route contemplated by Congress, and the withdrawal directed by the department constituted the statutory withdrawal, then we can conceive of no authority in the department to authorize or permit the company, after all the rights and privileges to which it was entitled under its grant had thus attached, to select a second general route or to have a second general route withdrawal.

If the general route withdrawal continued until definite location in the place limits and until selection in the indemnity limits, as held by this court in Buttz vs. N. P. R. Co. supra, and the general route of 1870, constituted the statutory general route of the road, then the lands in controversy must be held to have been withdrawn, not by the terms of the grant, but by a purely departmental order.

If they were so withdrawn, then the restoration of such lands to settlement by order of the Secretary of the Interior with the consent of the president was clearly lawful.

This subject will be discussed with a citation of authorities in a subsequent point.

Second.—The lands did not fall within the limits of the statutory withdrawal upon the definate location of the road. This involves an enquiry into the question as to what lands were ... ded by Congress to be withdrawn, upon compliance by the company with the terms of the grant.

We contend that it is impossible to find words in the grant from which the congressional intent that any lands within the limits of the grant should be withdrawn from the operation of the general laws in force, prior to defenite location in the place limits, and selection of the indemnity limits, except those in sec. 6, where such intent is clearly expressed, and the *quantity limited, to* 40 *miles on each side of the road.* Within the forty mile limit it is provided that such lands should not be "liable to sale or entry or preemption before or after they are surveyed, except by said company" to-wit, at any time after their identification to

the grant by the map of general route: without the forty mile limits, it is provided that the homestead and pre-emption laws should extend "to all other lands on the line of said road when surveyed." This 40 mile strip would include all of the lands in both the place and indemnity limits of the road in the states and would include only the lands in the place limits in the Territories. If we are not mistaken in this construction, then the question as to whether the general route of 1870 or that of 1872 established the limits of the withdrawal, or whether any of our previous conclusions are well founded or not is not material, because finally the Company settled upon a line or route upon which it has take a consistent and definite stand, to-wit, its line of definite location and the lands in controversy fell *without* the limits of the 40 mile strip as thus located. (Transcript P. 3.)

It has been said by this Court that the construction placed by the department upon the laws which it is called upon to execute, will be received with great weight, "and ought not to be overruled without cogent reasons." "The officers concerned are usually able men and masters of the subject."

U. S. v Moore, 95 U. S. 760.

The question as to whether indemnity lands in the Territories were subject to withdrawal by the terms of the grant, was submitted to Mr. Justice Lamar while Secretary of the Interior in 1887. With the approval of the President he directed that the parties interested be given a hearing and after argument decided that not only did the terms of the act not provide that they should be withdrawn (outside of the 40 mile strip or place limits in the Territories) but that the terms of the act provided that they should not be so withdrawn.

In re At. & Pac. R. Co. 6 L. D. 77 et seq.

He said in his opinion in part "Sec. 6 provides, 'That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed and as fast as may be required by the construction of said railroad; and the odd numbered section of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the homestead and pre-emption laws are extended' to all other lands on the line of said road where surveyed, excepting those hereby granted to said company.'

Now here was a grant to the free alternate odd numbered sections to be found within twenty miles on each side of the road in the states and within forty miles in the territories; with the right to take the free odd numbered sections found within a further limit of ten miles as indemnity for lands lost in the granted limits The order was for the survey of the lands "for forty miles in width" or only to the extent of the granted limits in the territories and ten miles beyond the granted and indemnity limits in the states" * * * "As to the lands within the indemnity limits, the contract was based upon two contingencies; that of losing lands within the granted limits and being able to find sufficient to indemnify the company among the odd numbered sections within a further limit of ten miles. Here the interest of the company was so remote and contingent, being a mere potentiality and not a grant, that congress declined to order a withdrawal for the benefit of the same or even a survey."

In re At. & Pac. R. Co. 6 L. D. 86-7.

The opinion is an able one and worthy of consideration in its entirety, and were support to be found for our contention there only, we would submit this cause with considerable confidence.

Every Secretary from Mr. Justice Lamar to the present incumbent, has been requested to and has re considered the question at the request of the company, with such new light as subsequent decisions of the courts has shed upon the subject, with the result only of more strongly establishing the position there taken, that the grant did not direct the withdrawals of indemnity lands in the territories, but forbade it.

N. P. R. Co. v Miller, 7 L. D. 100.
N. P. R. Co. v Cole, 17 L. D. 8.
In re Fla. & Pen. R. Co. 15 L. D. 529.
M. K. &. T. Co. v N. P. R. Co. 17 L. D. 122.
N. P. R. Co. v Davis, 19 L. D. 87.
N. P. R. Co. v Lillethun, 21 L. D. 487.
S. P. R. Co. v Kanawyer, 23 L. D. 500.
Grunewald v N. P. R. Co. 24 L. D. 195.
N. P. R. Co. v St. Paul & M. R. Co. 25 L. D. 67.
N. P. R. C. v Streib, 26 L. D. 589.
Stuart v S. P. R. Co. 22 L. D. 61.

The line of the road passes through four of the then territories. To the courts of three of these, the precise question has been presented (we believe that the point has not been submitted to the supreme court of Idaho) and the construction of the department in each instance has been sustained as the law.

Elling v Trexton (7 Mont. 330.) 16 Pac. 931.
Grandin v LaBar (N. Dak.) 57 N. W. 243.
Moore v Cormode, 20 Wash. 305.

The case of Buttz vs. N. P. R. Co., 119 U. S. 55, came up from the then territory of Dakota. In that case the court held "when the general route of the road is thus fixed in good faith and information thereof given to the land department by filing the map thereof with the Commissioner of the general land office or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections *to the extent of forty miles on each side.*

In St. P. & Pac. vs. N. P. R. Co., 139 U. S. 1, this court held the limits of the statutory withdrawal to extend only to a distance of 40 miles on each side of the road. Other cases, both by this and other courts might be selected and cited to the same effect, but it seems to us useless to multiply authorities in support of a proposition so manifest, and it is submitted that the lands in question were not withdrawn *by the terms of the grant*, because they did not fall within the limits of the 40 mile strip ordered to be surveyed and withdrawn.

V.

THE ORDER OF THE DEPARTMENT DIRECTING THE WITHDRAWAL OF LANDS BEYOND THE FORTY MILE STRIP CONVEYED NO INTEREST IN THE LANDS TO THE COMPANY AND WAS REVOCABLE.

Upon the establishment by the grantee of its line of definite location, the department ordered the withdrawal of the odd numbered sections not only within the forty mile limits, but of all odd numbered sections lying within the exterior boundaries of the line of the road as thus located. Within the states through which the line of the road was thus located, the withdrawal was no doubt valid as a statutory withdrawal, but within the Territories, it has been submitted, the withdrawal of lands without the limits of the forty mile strip receives no support from the statute.

The lands without the forty mile strip, it is our construction of the grant, were left open to settlement and preemption by the express agreement of the parties. The terms of the grant are clear and unmistakable in that regard, we believe.

They were, however, withdrawn from settlement by order of the department from November 13, 1880 (Transcript, P. 3) until August 15, 1887, at which later date they

were, by order of the department with the approval of the President after a full hearing, upon notice, with the other lands of the grant lying without the forty mile strip, restored to the public domain and re-opened to settlement.

6 L. D. 77 to 93.

We understand the plaintiff in error to contend that it was within the general powers-of the Land Department to withdraw the lands from settlement, and in support of their contention they cite amongst other cases:

Riley v Welles, 76 U. S. 248.
Wolcott v Des Moines R. Co. 72 U. S. 681.
Woods v Beach, 156 U. S. 548.

None of these cases hold, however, that where the grant in aid of which the withdrawal is invoked, declares that the general land laws shall remain in force as to portions of the lands, that as to those lands the department has the power to over rule the will of Congress as thus expressed, and with-hold lands from settlement, which Congress has declared should remain open to settlement, until their selection by the Company under the direction of the Secretary of the Interior.

This Court, on the contrary has held that "the action of the Land Department cannot over rule the expressed will of Congress."

Burfenning v R. Co. 163 U. S. 321.

A withdrawal of lands without the forty mile strip would therefore be void, because in direct conflict with the will of Congress as expressed in the grant.

Assuming, however, that the department was in error in thus holding by an unbroken line of decisions from Secretary Lamar to the present incumbent, that the law forbade the withdrawal of lands without the forty mile strip, and that in regard to such lands the act neither directed nor forbade either by implication or in express terms, their withdrawal, then there is no question, we believe but that the department under its general powers might both withdraw them from and restore them to settlement.

Woolsey v Chapman, 101 U. S. 755.

Wood vs. Beach supra is a case where the principle was applied, and in some respects the facts are similar to those presented here. In that case the lands were within the indemnity limits of the grant; the line of the road was definitely located as here, prior to a settlement or a filing.

If it were true that independent of an order of withdrawal as between the settler and the grantee, such an interest would vest in the latter to indemnity lands upon

definite location, as to bar settlement or a filing upon the land by the former, then there would have been no need of discussion in that case, of the effect of a withdrawal. But in that case, the Court based its holding upon the fact that there were in force from the date of the definite location of the road until selection and patent to the grantee, two withdrawals of the lands from settlement; one statutory, clearly directing such withdrawal of such lands, the other a departmental order, and held that these withdrawals and not the definite location of the road, barred entry by the settler.

Therefore we say that this case furnishes direct authority in support of our point, that in the absence of a statutory or departmental withdrawal, lands lying within the indemnity limits of the grant remain open to settlement until they have become lawfully seggregated from the body of public lands, through their selection by the company with the approval of the Secretary of the Interior.

It has been submitted under a previous point, that the statutory withdrawal contemplated by congress, did not include the lands in question, and it is conceded that they did fall within the limits of the departmental order, by which other lands were withdrawn upon the definite location of the road, than those within the forty mile strip. No

question is raised here, but that such departmental withdrawal was effective to bar settlement unless contrary to the will of Congress as expressed in the grant, so long as the withdrawal remained in force. The question for solution is whether, where by the terms of a grant Congress has provided for a statutory withdrawal of a strip of lands forty miles in width on each side of the road, and the department has ordered the withdrawal of such lands, and in addition thereto has ordered a further withdrawal of a strip ten miles in width on each side of the road beyond the boundries of such statutory withdrawal, there is power in the department for reasons of public policy to revoke such departmental withdrawal and to restore such lands to the public domain.

There has never existed in the Department any doubt of its authority to restore lands to the public domain which it had withdrawn through its general powers

In his general order directing the withdrawal of lands lying without the forty mile strip but within the first indemnity limits of the road, Mr. Secretary Teller on May 17, 1883, used the following language clearly indicating his opinion that such withdrawal was merely departmental and discretionary, and revokable for reasons of public

policy. "If the Company neglects to make its selection and takes advantage of the withdrawals theretofore made or that may be made hereafter to withhold lands not actually needed to make good losses they have sustained, it will be the duty of the Department to revoke such order of withdrawal."

2 L. D. 516.

His successor, Mr. Secretary Lamar in his opinion revoking the order of withdrawal of lands lying without the forty mile strip held: "On a full consideration of the whole subject, I conclude that the withdrawal for indemnity purposes if permissable under the law, was solely by virtue of executive authority and may be revoked by the same authority; that such revocation would not be a violation of either law or equity, and that said lands having been so long with-held for the benefit of the company, the time has arrived when public policy and justice demand that the withdrawal should be revoked and some regard had for the rights of those seeking and needing homes on the public domain."

6 L. D. 91.

The withdrawals covering the lands in controversy were accordingly revoked on August 15, 1887, 6 L. D, 92,

and the defendents in error's filing allowed, on October 31, 1887.

Transcript P. 8.

"It has been the uniform construction of the Department that the requirment to withdraw lands on account of the Pacific Railroad grants upon the location of the roads, extended only to the granted lands; that all withdrawals of indemnity lands on account of these grants rest on executive action alone, and, consequently that such indemnity withdrawals might be revoked whenever in the judgment of the Secretary of the Interior, the necessity of the case required it."

In. v S. P. R, Co., 18 L. D. 315.
S. P. R. Co., v McWharter 14 L. D. 612.
S. P. R. Co. v Meyer, 9 L. D. 250.
N. P. R. Co. v Miller, 7 L. D. 100.

The contemporaneous construction of the statute by those charged with the duty of executing it, is entitled to great respect and "will not be over ruled without cogent reasons."

U. S. v Moore, 95 U. S. 760.

It would scarcely be consistent with the generally accepted view of the powers of the Secretary of the Interior as based upon the decisions of this Court, to say that he had

the discretionary power to withdraw land from settlement because of some existing condition which seemed to require such action, but that upon the recognition of some other or new condition which required the restoration of such lands to their normal condition, that he had no power to restore them. Such want of authority to restore the lands to the public domain would probably cause him to hesitate to exercise his authority to withdraw them, even in case where such withdrawal would seem to best subserve public interests, if his powers were so limited, because of the length of time which might be required to procure Congressional authority to act in the premises. We believe however that the powers conferred by Congress are sufficiently broad to include a revocation of a departmental order as well as its promulgation, where the order relates to the status of the public lands.

Knight v Land Association 142 U. S. 161.

There are reasons of public policy based upon the abuses of the grant by the Northern Pacific Railroad Company, which it seemes to us ought to bear heavily in favor of sustaining the action of the Secretary in revoking the order of withdrawal under consideration.

While the grant was executed in 1864 as a war meas-

ure to aid the government in the transportion of munitions of war and troops, the road was not even definitely located until 1880 and it was then only definitely located as to portions of the road. That portion extending through the Yakima Indian Reservation in the Territory of Washington in lieu of the lands lost in which, the lands in controvercy are sought to be selected, Transcript P. 6 were not definitely located until a date later than the filing of this case.

N P. R Co v Miller, 7 L D. 124-5.

From 1870 until 1880, a wide strip of land remained under a cloud in this territory by reason of the several maps of general route filed by the company, amongst others, the Perham map, the map and withdrawal of 1870, and the map and withdrawal of 1872, each covering a widely different territory, and acting as a check upon the settlement of the public lands in this state.

From the definite location of the road in 1880 until 1887, not only had all the lands which Congress agreed should be withdrawn, been withdrawn, but lands which Congress expressly declared should remain open to entry and settlement, were withdrawn for the benefit of the grantee. During these seven years the company had not yet so adjusted its line of definite location as make it appear to

the satisfaction of the land department as to what losses it had suffered.

It claimed large losses in its main limits but was able to establish to the satisfaction of the Secretary only comparatively a small quantity in this state.

N. P. R. Co. v Miller, 7 L. D. 124-5.

The several Secretaries of the Interior who have been called upon to act with reference to the grant under consideration have expressed in strong terms in some of the cases herein before cited, their condemnation of the neglect of the company to exercise its right of selection promptly, and thus remove the bar to settlement which the several withdrawals constituted. Finally when Secretary Lamar revoked the orders of withdrawal in 1887, it is a part of the history of the territories effected, that a large number of persons settled upon lands similarly situated to these and built thereon homes. They have made improvements, brought the lands under cultivation, built valuable houses, planted orchards and made wise provisions for old age, acting in full faith upon the promise of the government contained in Secretary Lamar's order restoring the lands to settlement, to convey to them good and sufficient titles to the land.

In 1888, a neighbor of the defendant in error, prosecuted his case upon facts in all essentials identical with those here, through the Department, Miller vs. N. P. R. Co., supra and received a patent, and his case became a precedent not only to guide the Department in its future decisions but settlers in their future course. Instead of buying their lands from the railroad, upon the precedent thus established, they bought from the government and the railroad sold the same lands to others, so that the settler is without remedy, if it be held that Secretary Lamar's order was without authority of law.

No attempt was made by the company to bring the Miller case or a similar one to this Court upon whose authority alone the Department would consent to change its ruling.

In other words, more than twenty years have elapsed since the order restoring these lands to settlement was made, the face of the country has changed from its then pioneer condition to that of a prosperous farming community and now for the first time, consistent with its dilitory policy throughout its entire history, the railroad company has brought a case here in the name of its grantees to determine the validity of Secretary Lamar's order. All the

world, except the Company has adjusted its affairs to the condition resulting from such order, and it seems to us that it would be more equitable to require the Company to conform to the existing conditions, than that the rest of the world should be required to turn back to twenty years ago.

Not only has it been the uniform holding of the Department, that a departmental order withdrawing public lands from settlement was revocable for reasons of public policy by the Secretary of the Interior with the approval of the President, but this Court has clearly indicated its opinion that such power was vested in the executive department.

In Wood vs. Beach supra, in holding the departmental order thereunder consideration, to constitute a bar to a filing upon the lands in controversy, it was said; "This withdrew the lands from private entry, and as we held in Riley vs. Welles, was sufficient to defeat a settlement for the purpose of a pre-emption, *while the order was in force*, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal. It is not conceivable that in using the words italicised, the Court meant until an act of Congress should over rule the Departmental order and thus suspend its force; on the contrary we construe these words to limit the

order of withdrawal thereunder consideration to such time as it remained unrevoked by the agency of the government upon whose authority the order was promulgated.

It is certain that the order of withdrawal in this case was not in force at the time of the entry, and being a mere departmental order it was not a matter with reference to which Congress would ordinarily take cognizance. Not being in force, having been revoked by the authority of the agency which gave it force, it follows from the logic of Wood vs. Beach that the order did not constitute a bar to an entry of the lands.

We suppose that argument is unnecessary in support of the proposition, that a departmental order. such as that under consideration in Wood vs. Beach and in this case, did not convey any interest in the lands to the Company because if it did, then we suppose that neither Congress nor the President could revoke it, because such revocation in such case would amount to confiscation and be therefor void, and the limitation in Wood vs. Beach supra that a departmental withdrawal barred entry only, "while the order was in force," would be meaningless. Clearly the language quoted meant that the order barred an entry so long as it remained unrevoked by the executive depart-

ment which in the exercise of its implied powers and of the control vested in it by Congress over the public lands had made the order. It did not mean, we submit, that such order remained in force until over ruled by the Legislative Department from which source the order derived no authority and contrary to the will of which, it seems to have been conceded in that case as it certainly was in this, the order was issued.

The lands here were not "included in any reservation by any treaty, law, or proclamation of the President for any purpose" as were those in Wood vs. Beach supra because there was no such reservation existent at the time of the entry. Such reservation as had existed has been revoked and the lands restored to the public domain by the Secretary of the Interior with the approval of the President, after which and before any lawful selection of them by the Company, the defendant in error, filed on the lands and his filing was allowed by the department.

It would be difficult to find any authority in the Executive Department authorizing a withdrawal of lands in aid of a grant to a railroad, except that contained within its general powers and supervision over the public lands.

If those powers were broad enough to create a reservation not contemplated by Congress by a departmental order they were certainly broad enough upon elementrry principles to authorize a revocation of such order and the restoration of the lands reserved to the public domain.

Knight v United Land Assn 142 U. S. 161.
Bishop of Nesqually v Gibbon, 158 U. S. 155.
Williams v United States, 138 U. S. 514.

VI.

THE ALLEGED SELECTIONS, PRECEEDING THE ENTRY, WERE NOT APPROVED BY THE SECRETARY OF THE INTERIOR AND WERE INSUFFICIENT TO DEFEAT THE ENTRY OF THE DEFENDANT IN ERROR.

Assuming that the lands in controversey did not fall within the statutory withdrawal contemplated by Congress, and that the Departmental withdrawal was lawfully revoked prior to the entry by the defendant in error, the right of the plaintiff in error to the lands must be measured by the effectiveness of the selection of these lands by the Company prior to the entry. These selections are pleaded at Transcript P. 5-6.

It has hereto fore been submitted that these allegations were insufficient as a matter of practice in that it was neither pleaded that the selections were approved by the Secretary nor were facts pleaded excepting the case from the rule requiring such pleading.

All that is pleaded might have been true and yet the Secretary have lawfully refused to approve the selection of the specific lands claimed.

The point which will now be discussed is, whether the facts found by the Department in this case, incorporated into the pleading by the reference in the decision of the Commissioner to the cases cited, were such as to authorize this court in a collateral proceeding to indirectly coerce the Executive Department into an approval of the alleged selections of 1883 and 1887.

In other words where Congress has imposed a judicial discretion in the Secretary of the Interior to approve or disapprove the selection of the Company of certain lands within the indemnity limits in lieu of lands lost in the place limits of the road, and the Secretary has exercised that discretion in good faith and has rejected the proposed selections can the Courts review such action in a collateral

proceeding, and substitute in effect its approval for that of the Secretaries by a decree finally allowing such selection?

To answer this question affirmatively it must be conceded is to hold, that the Secretary's approval is not essential to title to lands within the indemnity limits of the road.

The rule as we understand it to be, is that the Courts will not, so long as the title to the lands remains in the United States interfere with the action of the Land Department. That when the Department has finally exercised the discretion vested in it, and has issued a patent, that then if it appears upon the facts as found by the Department that an error of law has been committed, or that fraud has been perpetrated or a mistake made, that then the error may be corrected by a court of equity.

As to the facts, the findings of the Department in the absence of fraud or imposition, are conclusive, and it is upon the facts as found by the Secretary in passing upon these selections, that their validity must be measured here.

Lee v Johnson, 116 U. S. 48.
Johnson v Towsley, 13 Wal. 72.
Shepley v Cowan, 91 U. S. 330.
Moore v Robbins, 96 U. S. 530.
Marquez v Frisbie, 101 U. S. 473.
Vance v Burbank, 101 U. S. 514.
Sanford v Sanford, 139 U. S. 642.
N. P. R. Co. v Colburn, 164 U. S. 383.

The claim of selection of 1883 was based upon the assertion that the entire unappropriated portion of the indemnity limits of the road, were insufficient to indemnify the Company for losses within the main grant.

Miller v N. P. R. Co. 7 L. D. 123-4-5.

It was such a claim as is pleaded in the complaint at par. VII, Transcript P. 5.

"It gave no indication of the basis upon which a right of selection of this track could be claimed. It proceeded upon the assumption that the Company might select as many lands as it saw fit and make proof of its losses afterwards."

N. P. R. Co. v Miller, 7 L. D. 123-4.

This claim that the indemnity limits were insufficient to satisfy losses in the place limits of the road, has frequently been made upon the Land Department and was passed upon at as late a date as December 20, 1897, in re N. P.

P. Co., 25 L. D. 512, where it is shown that there was no foundation for such claim and that the Company had been so negligent in the adjustment of its losses and had made claims for indemnity so extraordinary, that the Secretary could not in justice to the Government, upon the facts, approve of the selection.

In the Land office decision last above cited, the Secretary said in reference to an official letter of the Department, "This letter shows that there has been no actual ascertainment of the amount of the deficiency or that any deficiency exists, and that any statements or certifications upon this subject heretofore made by your office are only estimates, based amongst other things, upon an approximation of the percentage of lands which may hereafter prove to have been excepted from the grant by reason of their mineral character."

For reasons stated in that opinion, the Secretary, (acting Secretary Ryan,) in 1897, rejected the bulk claims of selection of the N. P. R. Co., and required it, as his predecessors had done since Secretary Lamar's order, (4 L. D. 90), to specify the particular losses for which indemnity was demanded, and it is submitted that this Court ought not to hold the claim of indemnity of 1883 to be valid, where every

Secretary from the date of its submission until now has disapproved of it upon grounds of public policy. The finding by the Secretary that there was no deficiency in the grant, disposes of the claim of the right of a bulk selection, and brings the claim within the rule requiring a tract for tract selection or such other proper regulations as the Department might require for the protection of public interests. Such a selection was not made until after the filing upon the lands by the defendant in error.

The selection of 1887 was equally insufficient to pass title to the Company of the lands in question.

It was made after the settlement of the defendant in error upon the lands.

Settlement since the act of 1880 constitutes the initial step in the establishment of a homestead claim.

The patent in conclusive upon the question of the good faith of such settlement. Within the time required by the rule promulgated by Secretary Lamar in his order of August 1887, the defendant in error filed upon the land and his filing was allowed.

Transcript P. 7-6 L. D. 92.

Such settlement excepted the lands from selection by the Company exactly as did entry, when prior to 1880, a filing was the initial step in perfecting a claim of homestead.

The holdings of this Court to the effect that mere settlement and occupation by a qualified homesteader upon lands within the limits of a railroad grant in the absence of a record of such claim in the land office, do not operate so as to except the lands from the grant, were all in cases where entry constituted the initial step to a homestead claim, and each of the cases emphasize the fact that such occupation was not followed by a filing.

The grant to the N. P. R. Co., provides that the lands granted shall be "free from pre-emption or other claims or rights" since the act of 1885, settlement or occupation by a qualified homesteader clearly constitutes a claim and right: and such a claim and right ought to be protected because it is invited by the government, where, as in this case, within the time prescribed by the Department, entry was regulrly made of the lands in the local land office.

It seems to us that such a claim excepts the lands from the right of selection of the Company within the indemnity limits of the road.

N. P. R. Co. v Logging Co. 168 U. S. 605.
N. P. R. Co. v DeLacey, 174 U. S. 622.
N. P. R. Co v Sanders, 166 U. S. 620.
N. P. R. Co. v Colburn, 164 U. S. 383.

The claim of selection of 1887 was subject to the same objections as was that of 1883.

No finding was ever made by the Secretary that the that the lands in the indemnity limits were insufficient to satisfy losses in the place limits.

The amount of losses in the place limits of the road had not been ascertained. The line of the road was not definately located across this then Territory, and a claim of indemnity was and is now made, Transcript P. 5, on account of losses occurring within the route surveyed (but not in 1887 located) across the Yakima Reservation.

N. P. R. Co. v Miller, 7 L. D. 123-4-5.

It has been the uniform holding both of the Departpartment and this Court, that a claim for indemnity is without basis, prior to the definate location of the road, and it would follow that a bulk selection (as were the claims for indemnity of 1883 and 1887) based upon estimated losses, which include a portion of the road not definately located, would be void as a whole.

Speaking of the claim of selection of 1887, Secretary Vilas in N. P. R. Co. vs Miller, supra, said, "That list excellently illustrates the necessity for the rule mentioned." (The order of Secretary Lamar hereinbefore cited requiring a specification of losses.) Since 1883, the claim of this Company to take 58,000 acres in list number 2 has remained a cloud within all the lands embraced within it. Yet when called upon to specify particular lands lost from the granted limits for which a right of selection can exist, only 4011 acres are shown, except by claiming indemnity for about 58,000 acres of lands for the most part not particularly defined, lying within the Yakima reservation. But that Indian reservation lies about 200 miles Southwesterly from the lands of Miller; North of and opposite of that portion of the main line along the Columbia river, embraced in the map of general route of 1870. Those lands stand yet only as provisionally granted, the line of the road has not yet been definitely located and no construction whatever has been begun upon it. (The lands in controversy lie in three townships East of the lands in the Miller case.)

The Company may perhaps in the exercise of the right of definite location, so change the main line of its road, that the Yakima reservation shall not be within the granted limits of the main line.

In order to do this, it would not be necessary to make so radical a departure as was made from that line by the definite location East of the Columbia River. But, discarding that supposition, no absolute right of selection for lands lost from the granted lands can possibly arise until the line of definite location is made. It is unnecessary to elaborate so plain a proposition.

Continuing, the Secretary shows that losses have not been established along the line in this state up to that date (August 3, 1888,) a year after the defendant in error's filing upon the lands) in excess of 4011 acres, which loss the Secretary directed to be satisfied out of the lands selected by the Company lying nearest to the losses established, tracts lying far to the West of those claimed in this suit.

L. P. R. Co. vs. Miller, 7 L. D. 124-5.

This case was not intended to be nor has it been considered by the Department as establishing the rule of the case decided only, but as governing and deciding the cases of a large number of others claiming lands within the same locality, and the facts found by the department in the Miller case, have been adopted by reference in all similar subsequent departmental decisions. It would appear therefore, that at the date of the filing in question here, there

was no bar to entry arising from an existing order of withdrawal, nor from an approved selection, the department having fully exercised the discretion vested in it and protected the rights of the company by approving such selections of the company as had the lawful basis of established losses in the indemnity limits up to that time, out of other lands included within the list of selections filed by the company lying nearer the established losses.

That the Secretary may in the exercise of his discretion, direct the selection of lands nearest to the line of the road is in accord with the departmental rulings since the promulgation of Secretary Lamar's circular of August 4, 1885. 4 L. D. 90.

In re At. & Pac. 8 L. D. 373.
N. P. R. Co. v John O. Miller, 11 L. D. 428.
In re S. M. R. Ex. Co. 12 L. D. 518.
In re F. C. & P. R. Co. 15 L. D. 529.

Such regulation of indemnity selections by the Secretary has received the approval of this court.

Woods v Burlington R. Co. 104 U. S. 329.

The department in re N. P. R. Co., vs. John O. Miller 11 L. D. 428, based its holding that a bulk selection without the specification of losses was invalid upon the following sound reasoning: "Where lands are settled upon which

have been selected by the company in lieu of an equivalent quantity of lands without designating the particular bases for each tract, and any part of the basis should for any cause be disallowed it would be impossible to determine which of the selections should be rejected and which retained."

It had always been a rule of the department in the adjustment of indemnity selections to require a specification of particular losses for which indemnity was sought On March 28th, 1883, Secretary Teller issued an order excepting the N. P. R. Co., from the necessity of specifying losses with its lists of selections. A copy of this order appears in 12 L. D. 196. It's purpose was to expedite the adjustment of the claims of the company, so that the unselected portion of the lands included within the limits of the executive withdrawals might be restored to settlement.

It being evident that such course instead of aiding settlement, impeded it, Secretary Lamar modified this order on August 4, 1885 by requiring the specification of losses to accompany future selections and directing all selections to be made "from vacant unappropriated land within proper sections and limits nearest the granted sections in which the losses occurred."

4 L. D. 90 Supra.

The selection of the lands in controversy had not been approved by the Secretary of the Interior up to the date of this order, and no title or interest had then, therefore under the frequent rulings of this court passed to the company.

The Secretary was therefore authorized to insist upon the Company's complying with the terms of the grant and making proof of its losses and such other reasonable requirements as were contained in the order as a prerequisite to his approval.

The lists of 1883 were not however necessarily held for naught by the Department though they clearly might have been.

Frequently lists of such selections were approved upon proper specification of losses but never where intervening rights of settlers had attached.

Wiley v N. P. R. Co. 22 L. D. 606.
LaBar v N. P. R. Co. 17 L. D. 406.

The lists not having been approved and there being no reason why the Secretary in the absence of a specification of losses, should do more than disapprove of them, he might in the exercise of the discretion vested in his office say that he would not require the re-specification of the

selections with proof of losses but might hold the lists at the request of the Company subject to proof of losses, and approve such selections appearing within such lists as met with other requirements of the order, subject to intervening claims of settlers, because thereby the Company was saved the expense of filing new lists, the Department the toil of an examination of such new lists, and the lands in the meantime would remain subject to the rights of settlers exactly as though the original claim of selection had been formally rejected as insufficient under the new order. It is to be noted that the order of May, 1883, did not vest any interest in the lands included within the lists thereby authorized to be filed prior to the approval of the selection thereof by the Secretary upon proof of losses.

Instead of standing upon its claim of selection of 1883 to the lands embraced within the lists then filed, the Company on October 26, 1887, filed a new list of selections. (Transcript P. 6.)

This new list, it is pleaded, was in accordance with the instructions of the Department, but the only instructions in that regard were those contained in Secretary Lamar's order of August 4, 1885, supra, which did not require a

new list at all but protected all lawful claims appearing within the list of 1883.

These lists or claims of selection of 1887 the department held to constitute an abandonment of the claim of 1883, except in cases where no equities intervened.

La Bar vs. N. P. R. Co. 17 L. D. 406.
N. P. R. Co. vs. Lynch 22 L. D. 609.
S. P. R. Co. vs. McKinley 22 L. D. 493.
State of Wash. v N. P. R. Co. 22 L. D. 482.
Wiley vs. N. P. R. Co. 22 L. D. 606.
N. P. R. Co. v Holtz 22 L. D. 309.
John O. Miller v N. P. R. Co. 1 L. D. 428.
N. P. R. Co. v Grunewald 24 L. D. 195.

In all cases, however, where subsequent to the filing of the lists of 1883, and prior to the approval thereof, qualified homesteaders had settled upon the lands, the department has uniformly rejected such selection upon the ground that such settlement constituted a claim and right under the terms of the grant sufficient to except such lands from the selection.

The claims of selection of 1892 and 1893 need no consideration because prior to their submission to the department, the entry of the defendant in error had been allowed and status of the land must be determined as of the

date of the finding. If they were then subject to entry, the equitable title of course passed with the patent.

If the rulings of the department hereinbefore cited are examined, it will appear that this is not a case covering a few acres of land alone, but that the most important rules of the department by which the bulk of the public lands within the limits of almost every railroad grant in the country has been disposed of are involved and that the reversal of this case would overthrow precedents of 20 years standing and bring the utmost confusion in the Department.

The basis of the plaintiff in error's contention is, that prior to the approval of the Secretary, title or at least an interest to lands within the indemnity lands may pass to the company.

The contention has been so often submitted to this court and in so many ways that we submit that the question is no longer open for argument.

"The uniform practice is that no title of indemnity lands becomes vested in any Company or in any state until the selections are made and they are not considered as

made until they have been approved as provided by statute, by the Secretary of the Interior.

U. S. v M. K. R. Co. 141 U. S. 358.
St. P. R. Co. v Winona R. Co. 112 U. S. 720.
Sioux City R. Co. v Chicago R. Co. 117 U. S. 228.
Cedar Rapids R. Co. v Herring, 110 U. S. 27.
M. K. &. T. Co. v K. P. R. Co. 97 U. S. 491.
Wis. R. Co. v Price Co. 133 U. S. 496.
Wis. R. Co. v Forsythe, 159 U. S. 54.
U. S. v Colton Co. 146 U. S. 615.
Ryan v R. R. Co. 99 U. S. 382.

It is submitted that because prior to the approval of the selection of the lands in controversy, and prior to the establishment of definite losses as a basis of such selection, the defendant in error had not only settled upon but had filed upon the lands in the local land office, that his settlement and filing excepted the lands from selection by the Company, and that the patent was properly issued under the established precedents both of this Court and of the Department.

Respectfully Submitted,

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